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In The

Supreme Court of the United States

October Term, 1992

GARY GRAHAM,

Petitioner,

v.

JAMES A. COLLINS, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

ROBERT C. OWEN
Texas Resource Center
1206 San Antonio St.
Austin, Texas 78701
512/320-8300

JEFFREY J. POKORAK
St. Mary's University
School of Law
1 Camino Santa Maria
San Antonio, Texas
78228-8603
512/436-3779

*MICHAEL E. TIGAR
University of Texas
School of Law
727 East 26th St.
Austin, Texas 78705
512/471-6319

Counsel for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

A seventeen-year-old capital defendant introduced mitigating evidence of his youth, acts of kindness, religious observance, redeeming character traits, and troubled family background. The sentencing jury was permitted by statute to answer only three questions:

> whether he acted "deliberately" in committing the offense,
>
> whether he might be dangerous in the future, and
>
> whether he acted unreasonably in response to any provocation by the deceased.

The jury was afforded no other vehicle for considering his mitigating evidence. Does this sentencing procedure satisfy the Eighth and Fourteenth Amendments?

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CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 950 F.2d 1009 (5th Cir. 1992) (*en banc*). The opinion and order of the United States District Court for the Southern District of Texas is unreported; it is Appendix F to Mr. Graham's Petition for Writ of Certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on January 3, 1992. The petition for certiorari was timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Eighth Amendment to the United States Constitution reads in pertinent part:

> [N]or [shall] cruel and unusual punishments [be] inflicted.

The Fourteenth Amendment to the United States Constitution reads in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law . . . .

The former Texas capital sentencing statute, Tex. Code Crim. Proc. Art. 37.071 (Vernon's ed. 1989), provided

> (b) On conclusion of the presentation of the evidence [at the sentencing phase of a capital murder trial], the court shall submit the following three issues to the jury:
>
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

. . . .

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death

. . . .

STATEMENT OF THE CASE

A. Course of Prior Proceedings

A Houston, Texas jury found Mr. Graham guilty of capital murder in 1981.[1] J.A. 16. The jury answered "yes" to the statutory special issue questions and the trial judge sentenced Mr. Graham to death as required by Texas law. J.A. 17-18; *see* former Tex. Code Crim. Proc. art. 37.071 (Vernon's ed. 1989).

The Texas Court of Criminal Appeals affirmed in an unpublished *per curiam* opinion. *Graham v. State*, No. 68,916 (Tex. Crim. App. 1984). In June, 1987, the trial court scheduled Mr. Graham's execution for July 30, 1987. *See Graham v. Lynaugh*, 854 F.2d 715, 716 (5th Cir. 1988). Mr. Graham sought state court postconviction relief, and his execution was postponed to permit review of the issues he had raised. *Id.* The state district court held an evidentiary hearing on January 8, 1988, and later recommended that Mr. Graham be denied relief. *Id; see* J.A. 20-32 (trial court's findings of fact and conclusions of law). The Texas Court of Criminal Appeals adopted the district judge's findings and denied relief in an unpublished opinion on February 19, 1988. *Ex Parte Graham*, No. 17,568-01, slip op. (Tex. Crim. App. 1988). J.A. 33-38.

Mr. Graham thereafter sought relief through a federal *habeas corpus* petition. *Graham*, 854 F.2d at 717. The district

[1] Mr. Graham was convicted of intentional murder in the course of committing or attempting to commit robbery, pursuant to Tex. Penal Code § 19.03 (a)(2) (West ed. 1992).

court dismissed the petition and denied a certificate of probable cause. *Id.* Mr. Graham appealed to the United States Court of Appeals for the Fifth Circuit and sought a certificate of probable cause; that Court received briefs and heard oral argument. *Id.* Relying on *Jurek v. Texas*, 428 U.S. 262 (1976), and this Court's then-recent decision in *Franklin v. Lynaugh*, 487 U.S. 164 (1988), the court of appeals rejected Mr. Graham's claim that the application of the Texas capital sentencing statute in his case violated the Eighth and Fourteenth Amendments by precluding the consideration of relevant mitigating evidence. *Graham*, 854 F.2d at 718-720. Although five Justices of this Court had expressed serious doubts in *Franklin* about the constitutionality of the former Texas statute as applied, and this Court had already granted review in *Penry*, the court of appeals concluded that Mr. Graham had made no "substantial showing of the denial of a federal right," and denied his application for certificate of probable cause. *Id.* at 723. Nevertheless, because this Court had granted certiorari in *Penry*, the Fifth Circuit temporarily stayed Mr. Graham's execution to permit him to petition for certiorari. *Id.*

In the wake of *Penry v. Lynaugh*, 492 U.S. 302 (1989), this Court vacated the Fifth Circuit's decision in *Graham* and remanded for reconsideration. *Graham v. Lynaugh*, 492 U.S. 915 (1989). A Fifth Circuit panel, upon reconsideration, granted *habeas* relief. *Graham v. Collins*, 896 F.2d 893 (5th Cir. 1990). The court concluded that

> The point of *Penry* is not that a special instruction is not necessary if a jury could give *some* effect to relevant evidence through the statutory questions; rather, a special instruction is required if a jury cannot give *full* effect to that evidence.

Graham, 896 F.2d at 898 (emphasis in original).

After the panel granted relief on remand, Respondent obtained rehearing *en banc*. *Graham v. Collins*, 903 F.2d 1014 (5th Cir. 1990). The *en banc* court narrowly reversed the panel decision, affirming Mr. Graham's death sentence by a vote of 7 to 6. *Graham v. Collins*, 950 F.2d 1009 (5th Cir.

1992) (*en banc*). The *en banc* court rejected the panel's interpretation of *Penry*, holding instead that

> [No additional jury instructions are necessary unless the] major mitigating thrust of the evidence is substantially beyond the scope of all the special issues.

Graham, 950 F.2d at 1027.

This Court granted review. *Graham v. Collins*, ___ U.S. ___, 60 U.S.L.W. 3827 (1992).

B. Statement of facts

Bobby Grant Lambert was shot and killed at a Safeway food store in Houston, Texas, on May 13, 1981. R. Vol. XVI at 7-9, 66-69. Bernadine Skillern, who was in the parking lot of the store, saw a black man struggle with the victim and then fire a gun. R. Vol. XVII at 233-330. At trial, Ms. Skillern identified the defendant, seventeen-year-old Gary Graham, as the man she had seen shoot Mr. Lambert. *Id.* at 331.

After the jury returned its verdict of guilty of capital murder, the State presented its case for the death penalty. Its witnesses testified that during a seven-day period in May, 1981, Mr. Graham had engaged in an outburst of violent conduct, committing several criminal offenses. R. Vol. XIX at 74 – Vol. XX at 473. The defense presented evidence of Mr. Graham's character and his troubled childhood through the testimony of his stepfather and grandmother. R. Vol. XX at 475-487.

Mr. Graham's grandmother, Ms. Emma Chron, described his childhood. *Id.* at 481. Ms. Chron told the jury that Gary's mother had been plagued her whole life by mental illness, and that this "nervous condition" had required Gary's mother to seek hospitalization and treatment between twenty and thirty times. *Id.* at 482-483. As a result of his mother's illness, Ms. Chron explained, young Gary had been frequently moved from one relative's home to another. *Id.* Despite these moves and a consequent lack of parental care and guidance, she added, Gary Graham had gone to church "all the time,"

because "he loved the Lord," and had never given her any problems when he was in her care. *Id.* at 485-487.

Mr. Graham's stepfather, Mr. Joe Samby, described Mr. Graham's redeeming traits as an adolescent. He testified that Mr. Graham had always treated him with kindness and respect. *Id.* at 475. Mr. Samby testified that although young Gary lived with his father at that time, he often visited his mother and always responded eagerly to requests for help. *Id.* at 477. For example, Mr. Samby recalled, Gary would cut the yard and help out his mother around the house. *Id.* In addition, Mr. Samby testified, by the time he was fifteen years old Gary had a job working with his father. *Id.* at 478. From his earnings, Mr. Samby testified, Gary purchased food and clothing for his own children. *Id.* at 479.

At closing argument in the penalty phase, defense counsel emphasized Mr. Graham's present moral culpability as a seventeen-year-old boy, arguing for "compassion" for this "young man" as a "human being." *Id.* at 489-495. Counsel emphasized Mr. Graham's youth: "A young man, hasn't even reached twenty years old. Not even twenty years old. He goes on a rage for seven days, seven days out of his life. . . . Gary Graham, seventeen years old, went on a rage for seven days." *Id.* at 492, 494. Because of Graham's youth, counsel urged, the jury should "find some compassion for that human being," and give him a life sentence. *Id.* at 495.

Mr. Graham's other defense attorney echoed these same themes:

> [When] you look at a young man of his age, what do you think about? What do you think about the years when you think about death? You think about finishing the years of your life back when you are at a point in your life when some people have no direction. Some people have no knowledge of where they're going or what they want to do. . . . You also have to look at changes in society. Changes in ages. . . . When you are 17 to 20, you are young, hot-to-trot. You are going to set the world on fire one way or the other, right or wrong. . . . [T]here is something about human nature that not only

> changes you, but slows you down as you live. If you live. If you live. I'm asking you, ladies and gentlemen, to give the man a chance to live. . . . I ask you for Gary Graham's life.

Id. at 499-504.

In response, the district attorney reminded the jurors that they had taken an oath to follow the law, and that the special issue questions were all they were permitted to answer. *Id.* at 504-510. He argued that Mr. Graham's youth was relevant not as an indicator of his present culpability, but exclusively as an index of future dangerousness:

> Gary Graham does have direction, and he has shown you that direction. He has shown you that direction in every way that you can possibly look at. And I stand before you now and I ask you on your oath as jurors to follow the law. . . .They ask you to look at his youth. . . . The seeds of our past are the harvest of the future and what seeds has Gary Graham planted? . . . His seeds are death. Pain. Suffering. Humiliation. Degradation. . . .Under the evidence and beyond a reasonable doubt it is the only proper verdict. Yes, special issue number one. Yes, to special issue number two. . . .and the death of Gary Graham.

Id.

The trial judge had already told the jurors during *voir dire* how narrowly the statutory special issues were to be applied. Although he acknowledged that they would not be given an instruction defining "deliberate," he took care to emphasize that "deliberate" meant simply "intentional."[2] In

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[2] *See, e.g.*, J.A. 169 (trial judge to Meredith Montague: "In my mind, the word deliberately means it is a person's intention . . . to commit that act."); *id.* at 205-206 (to Donald G. Ondruch: "In my mind when someone does something deliberately, it means he intended to do that."); *id.* at 246 (to Hugh R. Killgore: "[D]eliberately . . . means that, in my mind anyway, it is a person's . . . intention to do something . . . . "); *id.* at 291 (to David Gilroy: "I construe deliberately [to mean a person's] intent."); *id.* at

addition, the judge repeatedly described "deliberate" conduct as having a "conscious objective," the precise statutory definition of "intent" under Texas law.[3] With respect to the

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319-320 (to Bobby J. Pryor: "When I think of a word, deliberately, and a person committing a deliberate act, I think that if the person intended to do what he did . . . . ", "[D]id he take that person's life deliberately . . . did he intend to do what he did[?]"); *id.* at 353 (to Ben Dent Bradley: "Deliberately, in my mind, means that . . . [h]e intended to do something. . . .It is something that he intended to do and does . . . "); *id.* at 420 (to Reed D. Arney: "I interpret deliberately to mean a person's . . . intent to do something"); *id.* at 90 (to Rayburn M. Hoover: "Some people consider deliberately to mean an intentional act . . . "); *id.* at 127 (to Dennis Graham: "Did he do so deliberately? . . . Was it his intention to do that?").

[3] *See, e.g.*, J.A. 169 (trial judge to Meredith Montague: "In my mind, the word deliberately means it is a person's . . . conscious objective to commit that act"); *id.* at 205-206 (to Donald G. Ondruch: "In my mind when someone does something deliberately, . . . [i]t was his conscious objective to do what he did"); *id.* at 246 (to Hugh R. Killgore: "[D]eliberately . . . means that, in my mind anyway, it is a person's conscious objective . . . to do something . . . "); *id.* at 319 (to Bobby J. Pryor: "When I think of . . . a person committing a deliberate act, I think [of] his objective or conscious objective to do what he did"); *id.* at 353 (to Ben Dent Bradley: "Deliberately, in my mind, means that it is a person's conscious objective to do something"); *id.* at 420 (to Reed D. Arney: "I interpret deliberately to mean a person's conscious objective . . . to do something," "For deliberately to be the situation, if it's a person's conscious objective to do something and he does it"); *id.* at 90 (to Rayburn M. Hoover: "Some people consider deliberately to mean . . . someone's conscious objective to do th[e] act"); *id.* at 127 (to Dennis Graham: "Did he do so deliberately? Was it his conscious objective to do that?"); *cf.* Tex. Penal Code § 6.03 (a) (West ed. 1992) ("a person acts intentionally, or with intent, with respect to his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result"); *see also* Charge of the Court, J.A. 5 (reciting this statutory definition of "intent"). Given the trial court's statements at *voir dire*, and the complete absence of any guiding or definitional instructions at the punishment phase, a reasonable juror plainly would have interpreted the first special issue only to require a finding of "intentional" conduct – a finding mandated by the verdict at the guilt phase, *see* Tex. Penal Code § 19.03 (a)(2) – and thus to preclude the consideration of mitigating evidence.

"future dangerousness" issue, the trial judge offered many examples by way of illustration. Taken together, these examples established a minimal threshold of "dangerousness" to justify an affirmative finding; the judge informed jurors that offenses as minor as "pour[ing] paint on the hood of your car" or the "slashing of tires" would suffice as "criminal acts of violence."[4]

Thus inoculated, the jury answered the special issues in the affirmative, and the court sentenced Mr. Graham to death as required by the former Texas statute. R. Vol. I at 70-75.

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[4] *See, e.g.*, J.A. 247-248 (trial judge to Hugh R. Killgore: "And criminal acts of violence, obviously, have a broad range of consideration- . . . .Someone pours paint on the hood of your car . . . "); *id.* at 295 (to David Gilroy: "[S]omeone pouring paint on your car as it sits in the parking lot right now. That is a criminal act of violence"); *id.* at 422 (to Reed D. Arney: "Someone takes their Harley-Davidson on the front lawn of Cy-Fair High School and does doughnuts on the front lawn, that is an act of criminal violence"); *id.* at 321-322 (to Bobby J. Pryor: "If somebody takes a screw driver [sic] and goes from one end of your car to the other end and tears up the paint job, that is a crime of violence, also"); *id.* at 354-355 (to Ben Dent Bradley: "Slashing of tires. The throwing of paint on paint jobs. These are criminal acts of violence that involve property, but nonetheless are still acts of violence . . . "); *id.* at 128-129 (to Dennis Graham: "Someone rips the seats of your car with a knife. These are all acts of violence . . . "); *id.* at 172 (to Meredith Montague: "Someone will fully destroy property you own. That is an act of violence . . . "); *id.* at 210 (to Donald G. Ondruch: "Someone steals a radio out of your car or truck. That is an act of violence. That is an act of criminal mischief. So, all these fall within that area of criminal acts of violence"); *id.* at 389-390 (to Billie Diane Gaskill: "If someone were to run a Volkswagen across your front porch and knock out one of the pillars, that is a crime of violence . . . "); *id.* at 455 (to Mary Ann Gaylord: "[C]riminal acts of violence . . . include . . . where someone may pull your glasses from your face and touch the side of your head, if you find that offensive . . . ").

SUMMARY OF ARGUMENT

Since 1976 this Court has taught that an individualized sentencing determination is an Eighth Amendment prerequisite to imposition of the death penalty.[5] To ensure that death is the appropriate punishment in a particular case, "it is essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense." *Roberts (Harry) v. Louisiana*, 431 U.S. 633, 637 (1977). Only thus is the Eighth Amendment requirement of "heightened reliability" satisfied.[6] Accordingly, a State may

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[5] This Court's reliance on this principle (the "*Lockett* rule," after *Lockett v. Ohio*, 438 U.S. 586 (1978), adopted by a majority of the Court in *Eddings v. Oklahoma*, 455 U.S. 104 (1982)) to resolve other constitutional questions, in areas ranging from jury instructions to *voir dire* to the admissibility of "victim impact" evidence, illustrates its centrality to death penalty jurisprudence. *See Morgan v. Illinois*, ___ U.S. ___, 112 S.Ct. 2222 (1992) (requiring trial court to conduct *voir dire* adequate to determine whether prospective jurors will consider mitigating evidence at sentencing phase, and requiring exclusion of those who will not); *Payne v. Tennessee*, ___ U.S. ___, 111 S.Ct. 2597 (1991) (holding "victim impact evidence" admissible to counter broad admissibility of mitigating evidence under rule of *Lockett*); *Mills v. Maryland*, 486 U.S. 367 (1988) (invalidating jury instruction requiring unanimity as to the existence of particular mitigating factors).

Moreover, this Court's rejection of various *per se* barriers to the imposition of the death penalty – on 16- and 17-year-olds, for example, or on the mentally retarded – has rested on the assurance that each defendant will have a fair opportunity to convince the sentencer that the balance of aggravation and mitigation in his case warrants a life sentence, rather than the death penalty. *Stanford v. Kentucky*, 492 U.S. 361, 375 (1989); *Penry*, 492 U.S. 302, 337-338 (1989); *see text infra*.

[6] *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("Because of [the qualitative difference between a term of years and a death sentence], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case"). *Woodson* held that a statute that did not allow the sentencer to consider "the character and record of the individual offender and the circumstances of the particular offense" in determining whether death was

not "limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty." *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987).

This Court applied these basic principles to the now-discarded Texas capital sentencing scheme in *Penry v. Lynaugh*, 492 U.S. 302 (1989). Having conditionally approved the former Texas statute on the promise that Texas would interpret the "special issue" format to permit the jury's full consideration of all mitigating evidence, the Court considered whether Texas had fulfilled that assurance in Penry's case. *Id.* at 315-317; *see also Jurek v. Texas*, 428 U.S. 262 (1976). This Court concluded that it had not. Penry's mental retardation and abused childhood were relevant to his moral culpability beyond the scope of the Texas special issues. Without special instructions, the jury had no way to express its "reasoned moral response" to Penry's mitigating circumstances by imposing a sentence less than death. Thus, there was an unacceptable risk that Penry was sentenced to death in spite of factors that might have called for a less severe penalty, and the Eighth Amendment required resentencing. *See Penry*, 492 U.S. at 328; *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). An application of *Penry* to Mr. Graham's case calls for the same conclusion.

Gary Graham was seventeen years old and the product of a troubled family background when he was charged with capital murder. The heritage of our criminal law teaches that Mr. Graham's youth alone could appropriately justify the exercise of leniency; the sentencer must be free to base a life sentence on such a powerful mitigating factor. *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Stanford v. Kentucky*, 492 U.S. 361 (1989). Moreover, because of Mr. Graham's youth, "there can be no doubt that evidence of his turbulent family history . . . is particularly relevant" to the appropriateness of a

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the appropriate punishment violated the Eighth Amendment. *Id.* at 304. Between *Woodson* and *Lockett*, this Court invalidated two other mandatory death sentencing schemes on the same ground. *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976).

death sentence. *Eddings*, 455 U.S. at 115. Despite his turbulent childhood, Gary Graham had shown religious devotion, and had grown into a teenager who helped his family and worked to support his own children. As in *Penry*, the jury that sentenced Mr. Graham to death could not consider and give independent weight to these mitigating factors.

The jury's sentencing deliberations were restricted to the former Texas special issues, which were presented in the bare terms of the statute. The trial judge had told the jurors during *voir dire* that "deliberateness" meant no more than "intent" and that "criminal violence" included acts as trivial as damaging the paint on someone's automobile. No further definitions or explanation of the terms used in the special issues were given in the instructions. Mr. Graham's youth, his family history, and his redeeming character traits had relevance to his moral culpability – to the appropriateness of a death sentence – wholly apart from the deliberateness of his crime or his likely future behavior as those issues were understood by his jury. Thus, the narrow questions presented to the jury virtually foreclosed an inquiry into Mr. Graham's personal culpability. Without instructions to broaden its discretion beyond a plain reading of the special issues, the jury could not express the "reasoned moral response" that Mr. Graham should be sentenced to life imprisonment rather than death because of his youth, background, and redeeming character traits.

Penry's integrity lies in its faithful adherence to the Eighth Amendment principle of *Eddings* and *Lockett*: a State may not preclude meaningful consideration of relevant evidence proffered in support of a life sentence. The capital sentencer must be allowed to express its "reasoned moral response" to the individual circumstances of the offender to ensure that "punishment [is] directly related to the personal culpability of the defendant." *Penry*, 492 U.S. at 319; *see also California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). When a defendant presents mitigating evidence of his background and character in support of a life sentence, the Eighth Amendment requires that the sentencer not be precluded from giving mitigating effect to *all relevant aspects*

of that evidence. The court of appeals erred in failing to apply this rule, substituting instead a concept – "major mitigating thrust" – foreign to the Eighth Amendment: the court of appeals finds no *Penry* violation unless the so-called "major mitigating thrust" of a defendant's evidence falls outside all the special issues. The "thrust" formula both unconstitutionally cuts off jury consideration of mitigating evidence and arrogates to reviewing courts a role properly reserved to the sentencer under state law. In Texas, a properly instructed jury must determine in the first instance whether particular mitigating evidence warrants a sentence less than death.

The circumstances of this case, in light of *Penry*, compel the conclusion that Mr. Graham may have been sentenced to death despite circumstances which called for a life sentence. *See Penry*, 492 U.S. at 328. A death sentence imposed under these circumstances violates the Eighth Amendment.

ARGUMENT

A. Prior decisions of this Court yielded in *Penry v. Lynaugh*, 492 U.S. 302 (1989), a straightforward test for determining Eighth Amendment error in the application of the former Texas capital sentencing statute.

Penry v. Lynaugh, 492 U.S. 302 (1989), applying *Eddings v. Oklahoma*, 455 U.S. 104 (1982) and *Lockett v. Ohio*, 438 U.S. 586 (1978), established a clear test for the constitutional sufficiency of the former Texas capital sentencing statute as applied, namely, whether the jury was able to give "full consideration of evidence that mitigates against the death penalty" in answering the statutory "special issues." *Penry*, 492 U.S. at 328. *Penry* confirmed[7] that the former Texas

[7] A year earlier, five Justices had expressed serious doubts about the continuing vitality of the former Texas scheme after *Lockett* and *Eddings*. *Franklin v. Lynaugh*, 487 U.S. 164 (1988). *Franklin* considered whether a bare stipulation of a clean prison disciplinary record could be given full mitigating effect under the former second special issue question. *Franklin*, 487 U.S. at 185. The concurring opinion (O'Connor, J., joined by Blackmun, J.), observed that such evidence "had no relevance to any other aspect of [Franklin's] character" apart from his propensity for future dangerousness, and concluded that under such circumstances the second special issue provided an adequate vehicle for the jury to consider and give effect to such evidence. *Id.*

special issue questions fail in certain cases to provide the jury any way to express the "reasoned moral response" that death is not the appropriate sentence for a particular offender. *Id.* Accordingly, *Penry* held that additional instructions would be required in such cases.

In *Penry*, the Court considered whether the former Texas statute adequately permitted independent mitigating consideration of evidence of mental retardation and childhood abuse. *Penry*, 492 U.S. at 307, 320. The State argued that *Jurek* foreclosed any constitutional attack on the Texas statute, but this Court concluded that the conditional endorsement of the Texas statute in *Jurek* rested on the possibility that the statute as applied would permit jurors fully to consider relevant mitigating evidence. Because the special issues foreclosed such consideration in Penry's case, the Court held, Penry's death sentence was constitutionally infirm.

Penry's jury was charged in the bare terms of the same Texas capital sentencing statute at issue here. *Id.* at 310. The jurors were instructed to answer three questions: whether Penry had acted "deliberately," whether there was a "probability" that he might be dangerous in the future, and whether he had acted "unreasonably" in response to any provocation by the deceased. *Id.* at 310; *see also* (former) Tex. Code Crim. Proc. art. 37.071. The jury answered all three questions affirmatively, and Penry was sentenced to death as required by statute.

To determine whether the former Texas scheme had permitted Penry's jury constitutionally sufficient latitude to

impose a life sentence based on his mitigating evidence, this Court employed *Lockett*'s simple test:[8]

> [T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case,[9] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Lockett, 438 U.S. at 604 (notes omitted) (emphasis in original); *see also Eddings*, 455 U.S. at 110. This Court concluded that the former Texas statute had too narrowly cabined the jury's "reasoned moral response" to Penry's evidence.

This Court first noted that Penry's mental retardation and his experience of abuse as a child were relevant to the first special issue – that is, they could be given some mitigating effect in answering whether he had acted "deliberately." *Penry*, 492 U.S. at 322; *see also* 492 U.S. at 356 (Scalia, J., dissenting) (noting relevance of Penry's evidence to the first special issue).[10] Similarly, these features of Penry's background and character had some mitigating relevance to the

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[8] Because Penry sought relief via federal habeas corpus, the Court first inquired whether the rule Penry urged was "new," in which case habeas relief would generally have been unavailable. *Penry*, 492 U.S. at 313; *see Teague v. Lane*, 489 U.S. 288 (1989). The Court concluded that the rule Penry sought was not "new;" on the contrary, it held, such a result was "*dictated*" by *Lockett* and *Eddings*. *Penry*, 492 U.S. at 319. This holding confirms that this Court's analysis in *Penry* was a straightforward application of the rule of *Lockett*.

[9] This Court on several occasions left open the possibility that an extremely narrowly defined capital offense – *e.g.*, murder by a prisoner already serving a life sentence – might justify a mandatory death penalty. This Court ultimately rejected the notion that the Eighth Amendment could ever permit the sentencer to impose death without first considering the reasons *not* to do so. *Sumner v. Shuman*, 483 U.S. 66 (1987).

[10] For purposes of this inquiry, the Court assumed without deciding that the jurors understood "deliberateness" to mean something more than "intent." *Penry*, 492 U.S. at 322.

third issue, whether he had acted "unreasonably" in response to provocation. *Id.* at 324.[11] Penry's evidence, however, had no mitigating relevance with respect to the "future dangerousness" question. *Id.* at 323-324. The question, then, was whether the jury's answers to the three special issue questions permitted them to give *full* mitigating weight to Penry's evidence.[12] Penry was entitled to additional jury instructions to allow the jury to give effect to his mitigating evidence notwithstanding its failure to raise a reasonable doubt concerning the special issues and its plain mitigating relevance to two of the three special issues.

With respect to the first special issue, this Court noted that "punishment should be directly related to the personal culpability of the criminal defendant," but held that "[p]ersonal culpability is not solely a function of a defendant's capacity to act 'deliberately.' " *Penry*, 492 U.S. at 319 (citing *Lockett* and *Eddings*), 322. Thus, a reasonable juror could have concluded that Penry acted "deliberately" as that term is commonly understood, but also that, because of his mental retardation and his background of abuse, he was less personally culpable – less deserving of death – than a defendant without such characteristics. *Id.* at 322-323. In the absence of special instructions, however, such a juror could not give effect to this conclusion in answering the first special issue.

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[11] It is significant that the Court concluded that Penry's jury required additional instructions even though his evidence had mitigating relevance to two of the three former "special issues," since a "no" answer to any single issue would have precluded the imposition of death. That the former statute provided "some" vehicle for the consideration of evidence as mitigating, then, plainly does not guarantee compliance with the Eighth Amendment in a particular case.

[12] *See Franklin*, 487 U.S. at 183 (plurality opinion), 185 (concurring opinion) (no Eighth Amendment error because the minimal mitigating evidence offered had no relevance to any facet of the defendant's character or background apart from its relevance to the likelihood of his future dangerousness, which was wholly encompassed in the second special issue).

With respect to the second question, Penry's evidence, despite its intuitively mitigating quality, actually supported an affirmative answer to the "future dangerousness" inquiry. *Id.* at 323. As a result, a reasonable juror who had concluded that Penry's evidence reduced his blameworthiness for the offense such that a less severe punishment was appropriate, but who was bound by oath to answer the special issues candidly, could not give effect to her ultimate conclusion concerning Penry's personal moral culpability. *Id.* at 324.

Under the third question, as under the first, Penry's intellectual deficit and history of abuse could have been considered in determining the "reasonableness" of his response to any provocation by the victim. *Id.* at 324. However, this Court acknowledged that Penry's impairment would not "necessarily diminish the 'unreasonableness' of his conduct" in response to any provocation. *Id.* Additional instructions were therefore required to permit a juror "who believed Penry lacked the moral culpability to be sentenced to death" to express that view, notwithstanding an affirmative response to the third special issue. *Id.*

In sum, *Penry* held that – given the strong command of *Lockett* and *Eddings* – the former Texas statute deprived Penry of an individualized determination of sentence. Although in 1976 that statute facially had not "operated . . . to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor," experience demonstrated that the statute *as applied* had precisely such an effect in cases where the defendant's mitigating evidence did not fit neatly or exclusively into the enumerated categories of the special issues. *See Penry*, 492 U.S. at 317. This Court concluded that resentencing by a properly instructed jury was necessary to ensure that death was not imposed despite factors calling for a lesser sentence. *Penry*, 492 U.S. at 328. *See also Lockett*, 438 U.S. at 605; *Eddings*, 455 U.S. at 119.[13]

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[13] *Penry's* reexamination under *Lockett* of the statute conditionally endorsed in *Jurek* parallels this Court's similar reconsideration of the scheme it had facially approved in *Proffitt v. Florida*, 428 U.S. 242 (1976). *Hitchcock v. Dugger*, 481 U.S. 393 (1987). Hitchcock introduced mitigating evidence

> that as a child [he] had the habit of inhaling gasoline fumes from automobile gas tanks; that he had once passed out after doing so; that thereafter his mind tended to wander; that [he] had been one of seven children in a poor family that earned its living by picking cotton; that his father had died of cancer; and that [he] had been a fond and affectionate uncle to the children of one of his brothers.

Hitchcock, 481 U.S. at 397. The Florida statute under which Hitchcock was sentenced – the statute approved in *Proffitt* – had limited "mitigating circumstances" to an enumerated list, though that restriction had subsequently been removed (post-*Lockett*, by the Florida legislature). Justice Scalia held for a unanimous Court that because some of Hitchcock's mitigating evidence had fallen outside the scope of the items on the former statutory list, his sentencing "did not comport with the requirements of . . . *Lockett*," and resentencing was required. *Id.* at 399.

1. As *Penry* illustrates, the Eighth Amendment requires adequate instructions to permit the jury's reasoned consideration of the defendant's moral culpability.

The focus on culpability in a capital sentencing proceeding is a function of the Eighth Amendment requirement of an individualized sentencing determination. For this reason, a State may not restrict a capital sentencer's "reasoned moral response" to some subset of all the relevant facets of the defendant's personal culpability. If it did so, the jury's decision might not reflect a "reasoned moral response" to the unique individual and the crime. Although this Court has taught us that "jurors *are* well-equipped to analyze the evidence." *Griffin v. United States*, ___ U.S. ___, 112 S.Ct. 466, 474 (1991) (emphasis in original), this observation reflects only that jurors in a capital case will be moved by the evidence for and against death, and are able to apply their human experience to understanding and assessing it. At the same time, however, this Court has cautioned that when jurors

"have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error." *Id.* Justice O'Connor's earlier observations on the former Texas capital sentencing statute reflect this emphasis on the importance of adequate jury instruction, and anticipate this Court's decision in *Penry:*

> If . . . petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its "reasoned moral response" to that evidence.

Franklin, 487 U.S. at 185 (concurring opinion). Thus, in determining whether a particular capital jury was able to perform its Eighth Amendment role, it is not enough to consider merely what evidence was or could have been placed before it. Of equal constitutional concern is whether the jury was able, under the pertinent instructions, to give effect to all proffered facts about the defendant's background and character that might make a sentence less than death appropriate. *Lockett*, 438 U.S. at 605.

When a State permits a capital sentencer to consider only certain facets of a defendant's background and character, those issues necessarily define the limits of sentencer discretion.[14] When the issues a capital sentencer must decide preclude it from responding to relevant mitigating evidence by imposing a life sentence because that evidence is irrelevant

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[14] Such a limitation may be imposed by statute, by jury instructions, or by a trial court's interpretation of governing law. *See, e.g., Hitchcock*, 481 U.S. at 398 (statute limiting mitigating factors to enumerated list); *Penry*, 492 U.S. at 322-326 (jury instructions limiting discretion to fully consider mitigating evidence); *Lockett*, 438 U.S. at 594 (trial court interpreted sentencing statute to forbid independent consideration of mitigating factors); *Eddings*, 455 U.S. at 113 (same).

to, or has relevance beyond, the inquiries to which the sentencer is limited, the sentencer's discretion has been unconstitutionally restricted. A death sentence imposed under such circumstances violates the Eighth Amendment.

2. Realizing that their sentencing statutes might preclude the jury from assessing the defendant's moral culpability, both Texas and Oregon moved to comply with the Eighth Amendment imperative of adequate jury instruction.

In light of *Penry*, the Texas legislature recognized that the former Texas statute confined jury discretion too narrowly to satisfy the Eighth Amendment in most cases. Accordingly, the legislature discarded the old scheme in favor of one affording the jury an explicit vehicle for giving effect to its reasoned moral response to all the mitigating circumstances in a particular case. The new statute retains the "special issue" format,[15] but with one vitally important difference: if the jury answers the "aggravating" special issues affirmatively, it must then determine

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

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[15] The current Texas capital sentencing statute in fact retains only the second special issue (the "future dangerousness" question) from the former statute. *See* Tex. Code Crim. Proc. art. 37.071 (b) (1). In cases prosecuted under the law of parties (pursuant to Tex. Penal Code §§ 7.01, 7.02), the new statute poses an explicit *Enmund* inquiry ("whether the defendant actually caused the death of the deceased or did not actually kill the deceased but intended to kill the deceased or another or anticipated that a human life would be taken"); *see Enmund v. Florida*, 458 U.S. 782 (1982).

Tex. Code Crim. Proc. art. 37.071, § 2 (b) (1), § 2 (b) (2), § 2 (e) (West ed. 1992).[16] This "catchall" mitigation issue now provides Texas juries the constitutionally required latitude to give independent weight to all relevant mitigating evidence in imposing sentence.

Penry likewise revealed the potential inadequacy of Oregon's capital sentencing statute, which had been explicitly modeled on the pre-*Penry* Texas scheme. After *Penry*, the Oregon Supreme Court invalidated that statute as applied in every case it considered, and required resentencing by a jury given a "catchall" mitigating evidence instruction. *See State v. Wagner*, 786 P.2d 93 (Or. 1990) (Opinion on remand from this Court in light of *Penry*).[17] Thus, Texas and Oregon, the

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[16] The new statute defines "mitigating evidence" as "evidence that a juror might regard as reducing the defendant's moral blameworthiness." *Id.*, § 2 (f) (4).

[17] Wagner had presented mitigating evidence of mental instability, suicide attempts, employment efforts, artistic ability, above-average intelligence, and relative youth; at least one judge on the Oregon court found Wagner's evidence "sparse" and still concluded that the special issues had denied him an individualized determination of sentence. *Wagner*, 752 P.2d at 1209-1210 (Gillette, J., dissenting from original affirmance of death sentence before this Court's remand in light of *Penry*).

After *Penry* and *Wagner*, the Oregon court required resentencing in every case it considered. *See State v. Farrar*, 786 P.2d 161 (Or. 1990) (evidence that defendant's mother had suffered from multiple sclerosis, that his father was mentally ill and violent, and that defendant suffered from a growth disease, had to be institutionalized, repeatedly attempted suicide, did not learn to read and write until he was incarcerated, and abused drugs, required resentencing under *Wagner* and *Penry*), *cert. denied*, 111 S.Ct. 212 (U.S. 1990); *State v. Moen*, 786 P.2d 111 (Or. 1990) (evidence of diminished culpability based on drinking and attempt to prevent one of the victims from obtaining drugs requires resentencing under *Wagner* and *Penry*). *See also State v. Rose*, 810 P.2d 839 (Or. 1991) (death sentence vacated under *Wagner* and *Penry*); *State v. Walton*, 809 P.2d 81 (Or. 1991) (same); *State v. Pinnell*, 806 P.2d 110 (Or. 1991) (same); *State v. Stevens*, 806 P.2d 92 (Or. 1991) (same); *State v. Douglas*, 800 P.2d 288 (Or. 1990) (same); *State v. Simonsen*, 798 P.2d 241 (Or. 1990) (same); *State v. Guzek*, 797 P.2d 1031 (Or. 1990) (same); *State v. Smith*, 791 P.2d

only two states that unduly constricted the jury's consideration of mitigating evidence through the "special issue" format, have modified their statutes to satisfy the Eighth Amendment mandate of *Lockett* and *Penry*.

B. A reasonable and conscientious juror who concluded that Mr. Graham's mitigating evidence warranted a sentence other than death had no way to give effect to that conclusion.

Gary Graham was seventeen, legally a minor, at the time of the offense for which he was sentenced to death. He was also the product of an unstable and unsupervised home environment, his mother constantly hospitalized for treatment of her mental illness. As a result of this turbulence and uncertainty in what should have been his nurturing home, young Gary was shuttled from relative to relative. Despite his background, Gary was respectful and helpful to his elders, a deeply religious child who volunteered to perform chores for the adults around him. As he grew into a teenager, Gary was still noted for his kindness and his eager willingness to respond to requests for help. Moreover, Gary by age fifteen was working a job to help support his own two children, buying them food and clothing from his earnings.

These features comprise a richly textured portrait of a teenager that a rational juror could have determined to spare from the ultimate penalty.[18] However, as this Court

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836 (Or. 1990) (same); *State v. Montez*, 789 P.2d 1352 (Or. 1990) (same); *State v. Nefstad*, 789 P.2d 1326 (Or. 1990) (same); *State v. Miranda*, 786 P.2d 155 (Or. 1990) (same).

[18] *Boyde v. California*, 494 U.S. 370, 385 (1990) (that defendant was "good with children" is mitigating); *South Carolina v. Gathers*, 490 U.S. 805 (1989) (White, J., dissenting) (that defendant was an affectionate and caring person and was not given sufficient guidance and discipline at home is mitigating); *Mills v. Maryland*, 486 U.S. 367 (1988) (youth (age twenty) is mitigating); *Burger v. Kemp*, 483 U.S. 776 (1987) (defendant's neglectful family background is mitigating); *Hitchcock v. Dugger*, 481 U.S. 393, 397 (1987) (that defendant was "a fond and affectionate uncle to the children of

recognized in *Penry*, the narrow special issues of the former Texas statute gave the jurors no adequate way to transform such a "reasoned moral response" to this evidence into a life sentence for Gary Graham.

1. Mr. Graham's youth, having unique power to counsel against a death sentence, could have evoked the "reasoned moral response" that he should not be put to death for his crime, but that conclusion might not have found expression in the answers to the special issue questions.

This Court has made repeated and forceful reference to youth as the archetypal mitigating factor that may justify a sentence less than death. Almost every member of the present Court has acknowledged this basic principle; for example, as early as 1976 this Court expressly acknowledged that a capital defendant's youth would mitigate against the imposition of the ultimate penalty:

> In addition, the jury's attention is focused on the character of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against the imposition of capital punishment (*e.g., his youth*, . . .)

Gregg v. Georgia, 428 U.S. 153, 197 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.) (emphasis added).

A year later, in *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977), youth leapt quickest to mind among potential elements of mitigation:

> [The sentencer is constitutionally bound to consider circumstances] such as the *youth of the offender*, . . . the influence of drugs, alcohol, or

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one of his brothers" is mitigating); *Tison v. Arizona*, 481 U.S. 137 (1987) (youth (one defendant was nineteen, the other twenty) is mitigating).

> extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct.

Id. at 637 (emphasis added).[19]

Lockett itself confirms the centrality of youth as a mitigating factor. The Ohio capital sentencing statute failed under the Eighth Amendment because it precluded the jury from considering mitigating evidence except as that evidence bore on three narrow questions. *See Lockett*, 438 U.S. at 607. This Court held that scheme unconstitutional because, *inter alia*, "considerations of a defendant's comparatively minor role in the offense, or *age*, would generally not be permitted, *as such*, to affect the sentencing decision." *Id.*, 438 U.S. at 608 (emphasis added).

When a majority of this Court endorsed *Lockett*, it again specifically emphasized the critical importance of a defendant's youth as evidence mitigating against the death penalty. *Eddings v. Oklahoma*, 455 U.S. 104 (1982). As the Court explained,

> Nor do we doubt that the evidence Eddings offered was relevant mitigating evidence. *Eddings was a youth of sixteen years at the time of the murder*. . . . The trial judge recognized that *youth must be considered a relevant mitigating factor*. But youth is *more than a chronological fact*. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage . . . [J]ust as *the chronological age of a minor is itself a relevant mitigating factor of great weight*, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.

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[19] *See also Sumner v. Shuman*, 483 U.S. 66, 81-82 (1987) (quoting with approval *Roberts'* descriptive list of potential mitigating factors, and striking down Nevada statute imposing mandatory death penalty for prison murders committed by life-term inmates).

455 U.S. at 115-116 (all emphases added).[20] Justice O'Connor noted that the defendant's status as a minor required that the Court take "extraordinary measures" to ensure that his evidence in support of a life sentence be fully and fairly considered. *Id.* at 118 (O'Connor, J., concurring).

In 1989, this Court considered whether the Eighth Amendment permitted the execution of seventeen-year-old capital defendants[21] *at all;* Justice Scalia rested this Court's holding that the Constitution erects no such *per se* bar on the condition that "individualized consideration is a constitutional requirement [in capital cases], . . . and one of the individualized mitigating factors that sentencers must be permitted to consider is the defendant's *age*."[22] *Stanford v.*

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[20] Even the dissenting Justices acknowledged that a young defendant's age is a mitigating factor which can, alone, support a sentence less than death. *Eddings*, 455 U.S. at 122 (Burger, C.J., dissenting) (noting that trial court had "taken account of Eddings' unfortunate childhood," and did not conclude that "*either* [Eddings'] youth *or* his family background was sufficient to offset the aggravating circumstances. . . . ") (emphasis added).

[21] That is, persons who – like Gary Graham – were seventeen years old at the time of the capital offense in question.

[22] This Court's conclusions with respect to the powerful mitigating relevance of a capital defendant's youth have been echoed by numerous courts. *See, e.g., Hill v. Lockhart*, 927 F.2d 340, 343 (8th Cir. 1991) ("[t]he determination whether an individual qualifies as a youth for purposes of mitigating against the death penalty is a subjective one appropriately made by a properly instructed jury"), *cert. denied*, ___ U.S. ___, 112 S. Ct. 344 (1991); *Magill v. Dugger*, 824 F.2d 879 (11th Cir. 1987) (defendant's young age [17] "is a powerful mitigating circumstance"); *High v. Kemp*, 819 F.2d 988, 993 (11th Cir. 1987) ("society's standards of decency" compel "consideration of an eighteen year old's youth as a mitigating factor"), *cert. granted, in part*, 487 U.S. 1233 (1988), *vacated*, 492 U.S. 926 (1989); *Moore v. Balkcom*, 716 F.2d 1511, 1524 (11th Cir. 1983) (age of 23 is mitigating), *cert. denied*, 465 U.S. 1084 (1984); *State v. Valencia*, 645 P.2d 239, 241 (Ariz. 1982) ("[youth] is a substantial and relevant factor which must be given great weight"); *People v. Frank*, 798 P.2d 1215 (Cal. 1990) ("[youthfulness] may well constitute a significant mitigating factor"), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2816 (1991); *Brown v. Francis*, 326

Kentucky, 492 U.S. 361, 375 (1989) (emphasis added).[23] Justices White and Kennedy, and the Chief Justice, joined Justice Scalia in affirming this basic principle, and no Justice disagreed with it.

This consistent line of authority reflects a widely shared understanding about the mitigating value of youth and youthfulness that traces deep roots in Anglo-American society. Although under Texas law a seventeen-year-old is eligible for the death penalty,[24] jurisprudence, history, tradition, science, and common sense all teach that an adolescent may be less culpable for his actions than an adult. As noted above, this Court recognized in *Eddings* that

> . . . youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years

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S.E.2d 735 (Ga. 1985), *cert. denied*, 474 U.S. 865 (1985); *Finney v. State*, 320 S.E.2d 147 (Ga. 1984), *cert. denied*, 470 U.S. 1088 (1985); *State v. Searcy*, 798 P.2d 914, 921 (Idaho 1990) (defendant's youth, even when murder manifested "exceptional depravity," is "sufficient to avoid capital punishment"); *Ice v. Commonwealth*, 667 S.W.2d 671, 680 (Ky. 1984) ("There is no question but that [the defendant]'s young age at the time of the offense is an important factor in his case that should have been given serious consideration . . . at the sentencing phase"), *cert. denied*, 469 U.S. 860 (1984); *State v. Barber*, 753 S.W.2d 659, 669 (Tenn. 1988) (jury was entitled to find defendant's youth mitigating even when he was 29 years old), *cert. denied*, 488 U.S. 900 (1988).

[23] The traditional importance of youth as a mitigating factor is also reflected in the fact that "[t]wenty-nine states [specifically designate] the defendant's age as a mitigating factor in capital cases." *Stanford*, 492 U.S. at 375, 375 n. 5 (listing statutes).

[24] *See Cannon v. State*, 691 S.W.2d 664, 678 (Tex. Crim. App. 1985) (capital sentence for defendant under eighteen years old not unconstitutional), *cert. denied*, 474 U.S. 1110 (1986); *Ferguson v. State*, 573 S.W.2d 516, 525 (Tex. Crim. App. 1978) (same), *cert. denied*, 442 U.S. 934 (1979).

> of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults.

455 U.S. at 115-116 (citation omitted).[25]

Young people are less intellectually mature, more prone to faulty judgment, more susceptible to the influence of others, and less accustomed to making moral decisions than are their elders. Young people likewise may not easily learn from experience or mistakes:

> In their search for a new sense of continuity and sameness, adolescents have to refight many of the battles of earlier years, even though to do so they must artificially appoint perfectly well-meaning people to play the roles of adversaries.

Erikson, *Childhood and Society* 261-263 (1963). They may be substantially impaired in their ability to control dangerous impulses:

> Risk-taking with body safety is common in the adolescent years . . . [including, for example, teenagers'] car racing, excessive use of drugs and alcoholic beverages, and other similar activities. . . .

Gordon, The Tattered Cloak of Immortality, in Corr and McNeil, eds., *Adolescence and Death* 16, 27 (1986). Indeed,

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[25] Scientific inquiry confirms this reasonable surmise, especially with respect to teenagers accused of murder. As one group of researchers has concluded,

> Adolescence is well recognized as a time of great physiological and psychological stress. Our data indicate that, above and beyond these maturational stresses, homicidal adolescents must cope with brain dysfunction, cognitive limitations, and severe psychopathology. Moreover, they must function in families that are not merely nonsupportive but also violent and brutally abusive.

Lewis, Pincus, *et al. Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States* (report prepared for presentation to the American Academy of Child and Adolescent Psychiatry) 11 (1987).

young people characteristically are so unable to weigh alternatives or evaluate the consequences of their conduct that they may unintentionally imperil themselves or others:

> The adolescent lives in an intense present: 'now' is so real to him that past and future seem pallid by comparison. Everything that is important and valuable in life lies either in the immediate life situation or in the rather close future.

Kastenbaum, Time and Death in Adolescence, in Feifel, ed., *The Meaning of Death* 99, 104 (1959). In sum, "[t]he difference that separates [juveniles] from adults [is their] immature, undeveloped ability to reason in an adultlike manner." Streib, *Death Penalty for Juveniles* 3-20, 184-189 (1987).

The sentencer in a capital case must be permitted to consider and give effect to both these mitigating qualities of "youthfulness," and to the chronological fact of youth itself. As this Court noted in *Eddings*, "[e]ven the normal 16-year-old customarily lacks the maturity of an adult," and the typical juvenile defendant is hardly normal, having been – like Gary Graham – "deprived of the care, concern, and parental attention that children deserve." 455 U.S. at 116. These mitigating qualities, while not suggesting "an absence of responsibility for the crime of murder," nevertheless may call for a sentence less than death and so must "be duly considered in sentencing." *Id.* *Eddings* distinguished "the chronological age of a minor," which is "itself a relevant mitigating factor of great weight," from "the background and mental and emotional development of a youthful defendant," and concluded that the Eighth Amendment requires that the sentencer be permitted to consider and give independent mitigating weight to *both*. *Id.*

Thus, *Eddings* holds that an adolescent defendant's lack of maturity, impulsiveness, inability to weigh consequences, and poorly developed sense of responsibility, as well as the bare fact of his age alone, are directly relevant to the jury's decision concerning the appropriateness of the death penalty as a punishment. It follows that a sentencing scheme which

precludes the sentencer from giving independent mitigating weight to evidence of youth violates the constitution.[26]

Eddings suggests at least one additional ground upon which a defendant's youth independently could support a sentence less than death. As the Court observed, "youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." *Eddings*, 455 U.S. at 115 n.11. A reasonable juror could conclude that the ultimate cost for such an abdication of responsibility should not fall on the teenage defendant whose moral and social development suffered as a result.

This discussion demonstrates that youth, perhaps above all other potential mitigating factors, can elicit the reasoned moral response that a death sentence is inappropriate in a given case. However, the jury that sentenced Mr. Graham was unable to voice the conclusion that Mr. Graham's youth justified a life sentence notwithstanding the answers to the special issues.

Under the first special issue question, Mr. Graham's mitigating evidence was either irrelevant to the jury's inquiry, or had relevance beyond its scope. *See Franklin*, 487 U.S. at 185; *see also Penry*, 492 U.S. at 322. Like Penry's mental retardation, Mr. Graham's youth was relevant to whether he was capable of acting "deliberately," because they made him "less able than a normal adult to control his impulses or to evaluate the consequences of his conduct." *Penry*, 492 U.S. at 322-323; *see also* social science sources cited *supra*. Yet, if a juror believed that Mr. Graham had acted "deliberately," as the trial judge had explained the term, but concluded, based on his mitigating evidence of youth, that he did not deserve to

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[26] Justice O'Connor noted that "of course, the relevant Oklahoma statute permits the defendant to *present* evidence of any mitigating circumstance." *Eddings*, 455 U.S. at 118 (O'Connor, J., concurring) (emphasis added). Because the sentencer could not *consider* and *give effect* to this evidence, however, the young defendant's death sentence violated the constitution. *Id.*

die, that juror could not express this "reasoned moral response."[27] This situation is precisely the same one condemned in *Penry*. This Court has recognized that "personal culpability is not solely a function of a defendant's capacity to act 'deliberately.' " *Penry*, 492 U.S. at 322. As a result, a sentencing verdict that indicates only that the defendant acted "deliberately" does not necessarily entail the conclusion that he ought to be sentenced to death. For this reason, the first special issue precluded the jury from considering or giving full mitigating effect to Mr. Graham's evidence of youth.[28]

Mr. Graham's mitigating evidence could do him no more good under the second special issue. As a consequence of Mr. Graham's youth, a reasonable juror could have found him "less able than a normal adult to control his impulses or to evaluate the consequences of his actions." *Penry*, 492 U.S. at 322. These qualities, however, would have compelled an attendant finding that Mr. Graham was likely to be dangerous again in the future,[29] particularly given the extraordinarily

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[27] Given that the jurors had already convicted Mr. Graham of an "intentional" killing, and that the trial judge at *voir dire* had relentlessly urged them to equate "intentionally" with "deliberately," it is apparent that any inquiry into Mr. Graham's moral culpability, at least as reflected in the answer to the first special issue, was foreclosed by their verdict at guilt.

[28] The Texas Court of Criminal Appeals has admitted that only a "moment of deliberation" on the part of the defendant was necessary under the former Texas statute to support an affirmative finding of "deliberateness." *Cannon v. State*, 691 S.W.2d 664, 677 (Tex. Crim. App. 1985). Given this *de minimis* standard, it is even more apparent that the jury may not have been able to consider Mr. Graham's youth in responding to the first special issue.

[29] One judge on the Texas Court of Criminal Appeals has acknowledged this effect:

> . . . in answering [the "future dangerousness" inquiry], a jury would decidedly consider the range and severity of the defendant's prior criminal conduct; yet truly "mitigating" evidence – such as a mental disease or defect, a deprived, abusive childhood *or the youth of the defendant* – while mitigating against a death sentence in general, *surely has tremendous specific*

low "threshold" for an affirmative finding as explained by the judge during *voir dire*.[30] Put bluntly, youth supports an affirmative answer to the second special issue because the jury must consider a longer period of time during which the young defendant may commit some violent act, than if he were a mature adult. The focus of the second special issue on predicting future behavior, rather than assessing present culpability, thus precluded the jury from considering and giving effect to Mr. Graham's youth as an example of those "compassionate [factors] stemming from the diverse frailties of humankind" which might reasonably support a life sentence. *Woodson*, 428 U.S. at 304. Instead, the former Texas statute turned this compassionate factor against Mr. Graham and made it support his condemnation and execution. Like Penry's evidence of mental retardation and childhood abuse, Mr. Graham's evidence of youth was a "two-edged sword;" because of the preclusive effect of the Texas statute, only the aggravating "edge" of Mr. Graham's evidence could be given effect by the jury. *See Penry*, 492 U.S. at 323-324.[31]

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probative weight in favor of answering the future dangerousness question "yes."

Stewart v. State, 686 S.W.2d 118, 125 (Tex. Crim. App. 1984), (Clinton, J., dissenting) (emphasis added); *see also Eddings*, 455 U.S. at 126 n.8 (Burger, C.J., dissenting) (citing studies indicating that a majority of violent youths may not immediately cease to be violent).

[30] Many of the examples of "criminal acts of violence" emphasized by the trial judge were nothing more than minor vandalism – throwing paint on cars, scratching them with keys, or riding on the schoolhouse lawn with a motorcycle. *See* n.4 *supra*. Any reasonable juror would have associated such acts almost exclusively with juveniles, and hence would have concluded that 17-year-old Gary Graham's youth required a "yes" answer to the second special issue.

[31] Of course, evidence relevant to a capital defendant's fate may often have this "two-edged" quality. For example, evidence of drug abuse, while potentially mitigating, *see Burger v. Kemp*, 483 U.S. 776, 813 (1987); *Bell v. Ohio*, 438 U.S. 637, 641 (1978), could also be perceived as aggravating by a particular juror since it might reflect voluntary lawless behavior. The key difference is that under the former Texas statute, a reasonable juror who regarded such "two-edged" evidence as *mitigating*, and wanted to impose a life sentence on that basis, could not do so within the straitjacket of the unadorned "special issue" scheme.

Under the third special issue, as under the first, the mitigating relevance of Mr. Graham's youth was not exhausted by its relevance to the question of provocation by the deceased. A conscientious juror could have concluded that any killing not in response to a lethal threat – any killing that is not legally excused by self-defense – is "unreasonable;" yet, that same juror could have concluded that Mr. Graham's youth made a death sentence excessive. Again, permitted only to respond to the statutory inquiries, such a juror may well have been prevented from expressing the reasoned belief that Mr. Graham's youth justified sparing his life.

2. Mr. Graham's troubled background, particularly in light of his youth, could have convinced a juror that he was not so culpable as to deserve death; however, a conscientious juror might have been precluded from giving effect to this conclusion in answering the special issue questions.

Gary Graham's family background failed to provide him the nurturing, care, and guidance necessary for him to grow into normal adulthood. When he was a child, his mother suffered repeated bouts with mental illness; she was hospitalized twenty to thirty times as a consequence. Because his mother's nervous breakdowns removed her from the home, other relatives had to step in and try to help raise young Gary. He was shuttled from one environment to the other, staying with his mother during those intervals when she was lucid and his grandmother when his mother was hospitalized. Sometime after he was ten or eleven years old, his father re-entered the family picture and joined the progression of Gary's caretakers.

Although other influences shape our social development, there can be no question that, at least from infancy to pre-adolescence, a child's parents and home environment most strongly affect her progress toward maturity. Instability, neglect, and unpredictability in the life of a child often have destructive consequences for that child's mental and emotional development. Thus, a child reared in an unstable home may well lack vital resources for dealing with the inevitable traumas and disappointments of later life.

A juror could have reasoned, based on the evidence concerning Mr. Graham's troubled family background, that he had failed to receive the nurturing and guidance necessary to cope with the pressures and changes of adolescence and to develop the judgment and insight of a normal healthy teenager. Gary Graham was not just a person who had committed violent and destructive acts over a seven-day period. He was a teenager who by fifteen was struggling to shoulder the difficult responsibilities of fatherhood. He was a young man who, throughout his childhood, had been deprived of the nurturing and stability necessary to help him master the turbulent years of adolescence.

This Court has instructed us that

> Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation. In some cases, such evidence properly may be given little weight. ***But when the defendant was 16 years old at the time of the offense*** there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant.

Eddings, 455 U.S. at 115 (emphasis added). This passage only acknowledges what common sense would recognize: the younger the defendant, the likelier that his behavior reflects the consequences of his troubled background. When the experiences that distorted a teenage defendant's psychological growth and moral development in the past are still relatively fresh, their outline may more easily be traced in the present. When such a defendant is only seventeen, the inference that

his turbulent childhood influenced his present behavior is certainly powerful, and one that the jury was entitled to make.

A reasonable juror could have concluded, based on the evidence of Mr. Graham's troubled family background, that he was less morally culpable for the offense than if he had been raised in a supportive home with proper guidance, and thus deserved a sentence less than death. However, if that same juror answered the special issue questions according to the evidence and in light of the trial judge's explanations at *voir dire*, she could not give effect to this conclusion.

Under the first special issue, Mr. Graham's turbulent family background was relevant to whether he was capable of acting "deliberately," since the likely effects of that upbringing – lack of insight and poor judgment, to name two – would color his ability to act in a "deliberate" manner as that term is commonly understood. Like Penry's mental retardation, Mr. Graham's troubled family background indicated that he might be "less able than a normal adult to control his impulses or to evaluate the consequences of his conduct." *Penry*, 492 U.S. at 322-323. Just as in *Penry*, however, the relevance of Mr. Graham's turbulent background to the appropriateness of a death sentence was not exhausted by its tendency to prove that his actions were not "deliberate." Because the jurors were given no instructions to guide their application of the first special issue, except for the trial judge's repeated equation of "deliberateness" and "intent," the jurors answering the first special issue in accordance with their oath were unable to give effect to their ultimate "reasoned moral response" concerning the appropriate sentence for Mr. Graham. Once the trial court established such a low threshold of proof for "deliberateness" – essentially crossed by the time the jury arrived at punishment – an affirmative finding on the first issue was a foregone conclusion.

As moral culpability is not solely a function of the capacity to act deliberately, neither is it solely a function of one's likely future conduct. One's youth and the effects of one's childhood have present mitigating value unrelated to one's potential for violent acts in the future. In fact, the very

circumstances which may mitigate moral culpability for present behavior may, as they did in this case and in *Penry*, increase the likelihood that one may be dangerous in the future.

With respect to the second special issue, Mr. Graham's troubled family background, like Penry's evidence of an abused childhood and mental retardation, was relevant to the jury's inquiry, but suggested an *affirmative* answer to the question of future dangerousness. A reasonable juror might well have concluded that Mr. Graham's troubled childhood had left him impaired in his ability to deal with other people, especially in situations charged with uncertainty or potential threat. Such a juror – reasoning that, as the district attorney argued at closing, "[t]he seeds of our past are the harvest of the future" – would be compelled to conclude that Mr. Graham, precisely *because* he had been raised in an unstable environment, without adequate supervision or nurturing, might lack the psychological and emotional resources to respond to such situations in a mature and nonviolent manner. The trial judge's emphasis on crimes of vandalism during *voir dire* would make it likelier still that such a juror would be oath-bound to return a "yes" answer to the second special issue. Limited only to the bare terms of the "continuing threat" inquiry, and informed by the judge that any minor act of vandalism would suffice to support an affirmative answer, a juror who concluded that Mr. Graham should not suffer death because his troubled background sufficiently reduced his moral culpability, *despite the likelihood that he might be dangerous at some point in the future*, had no vehicle for voicing that response.

The third special issue similarly failed to afford an adequate vehicle for the consideration of Mr. Graham's turbulent family background as mitigating. Since the jurors were not instructed on any standard to apply concerning the "reasonableness" of Mr. Graham's response to any provocation by the deceased (*e.g.*, whether the standard was one of objective or subjective reasonableness), a rational juror could have concluded that Mr. Graham acted "unreasonably" in killing the deceased. At the same time, it is plain that such a juror

could have concluded that Mr. Graham's turbulent background reduced his moral culpability so that a death sentence was not warranted, whether or not he had acted "unreasonably" in committing the offense. Without additional instructions, such a "reasoned moral response" could find no expression in the answer to the third special issue.

3. A reasonable juror could have viewed Mr. Graham's redeeming character traits and his acts of kindness as justifying a sentence less than death, but the focus of the special issues unfairly trivialized these factors in comparison to evidence of future dangerousness.

As defense counsel stressed in his closing argument at the punishment phase, Gary Graham had lived seventeen years as a kind, helpful, reverent, young man; against this brief lifetime of uniformly positive character traits was set one week in which Mr. Graham spun terribly out of control. If asked whether Mr. Graham's lifetime of redeeming traits, balanced against those seven awful days, could justify a sentence less than death, a reasonable juror might well have answered "yes."[32] However, the jurors were not permitted to express their response to the evidence in that fashion; instead, as with Mr. Graham's evidence of youth and his troubled family background, they were confined to the three bare "special issue" questions of the former Texas statute. So restricted, such a juror may have been unable to express the conclusion that Mr. Graham's redeeming traits justified sparing his life.

Mr. Graham presented evocative evidence of his positive character traits and acts of kindness. The jury learned that young Gary attended church regularly, because he "loved the Lord." As he grew older, he never failed to volunteer to do chores for members of his family, and to assist anyone who needed help. Too, Gary earnestly attempted at fifteen to

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[32] This is precisely the inquiry posed by the post-*Penry* capital sentencing statute in Texas. See Tex. Code Crim. Proc. art. 37.071 § 2(e).

shoulder the responsibility of caring for his own two children, taking a job with his father so that he could provide them food and clothing. The testimony established that, with the exception of one week in May, 1981, Mr. Graham's seventeen years had been characterized by religious devotion and loving care for his family.

Under the first special issue, Mr. Graham's mitigating evidence could have no effect on the jury's answer; his lifetime of kind acts and familial concern could neither prove nor disprove the "deliberateness" of his offense. This evidence, though unquestionably mitigating under every decision of this Court since 1976,[33] was wholly irrelevant to the first special issue question. As anticipated in *Franklin*, this evidence of "voluntary service, kindness to others, [and] religious devotion" was relevant to Mr. Graham's moral culpability but had nothing to do with the "deliberateness" of his offense. *Franklin*, 487 U.S. at 186. Particularly in light of the *voir dire* comments of the trial judge, equating "deliberateness" with "intent," this Court cannot be confident that the jury's reasoned moral response to Mr. Graham's mitigating evidence of redeeming character traits and acts of kindness found expression in its answer to the first special issue.

Mr. Graham's redeeming qualities were relevant to the second special issue – the "future dangerousness" inquiry. As the Fifth Circuit recognized, *see infra*, a history of positive character traits might give a jury some grounds for predicting an individual's future behavior. But to confine the value of

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[33] *See, e.g., Parker v. Dugger*, 498 U.S. ___, 111 S. Ct. 731, 736 (1991) (evidence of defendant's "positive adult relationship with his own children and with his neighbors" is mitigating); *Boyde v. California*, 494 U.S. 370, 385 (1990) (evidence that defendant was good with children is mitigating); *South Carolina v. Gathers*, 490 U.S. 805, 817 (1989) (O'Connor, J., dissenting) (evidence that defendant was affectionate and caring person and had been a quiet and affectionate child is mitigating); *Franklin v. Lynaugh*, 487 U.S. 164, 186 (1988) (O'Connor, J., concurring) (religious devotion is mitigating); *Hitchcock v. Dugger*, 481 U.S. 393, 397 (1987) (evidence that defendant was a fond and affectionate uncle to his brother's children is mitigating).

such evidence to "negating" a prediction of future dangerousness confuses two distinct inquiries. The assessment of present moral culpability for an offense is not the same thing as an empirical prediction of future behavior. The point of *Penry* is that the judgment whether a particular defendant deserves the death penalty may properly be informed by, but should not be foreclosed by, a determination that he may pose a threat to society in the future. *See Penry*, 492 U.S. at 328. Collapsing the two conflates a choice about *value* – whether a particular defendant *should* suffer death, measured in part by setting the worth of the defendant's life against the harm done by his acts – with a prediction of *fact* – whether that defendant *might* commit some unspecified act of violence in the future. This Court has repeatedly acknowledged the fact-bound, context-specific, subjective quality of capital sentencing,[34] which reflects its properly discretionary character. As the Court noted in *Penry*,

> Indeed it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or circumstances of the offense. Rather than creating a risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a "reasoned *moral* response to the defendant's background, character, and crime."

Id. at 327-328 (citations omitted).

This Court in *Penry* did not distinguish between positive and negative mitigating evidence. Rather, it held that the constitution is violated whenever a jury is not given an adequate vehicle by which it may fully consider and *give*

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[34] *See, e.g., Turner v. Murray*, 476 U.S. 28, 33-34 (1986) (fact that capital sentencing is irreducibly discretionary may require special procedures to prevent influence of racial prejudice); *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

effect to the mitigating evidence it hears, whether that evidence concerns the defendant's redeeming qualities or his "bad character." *Cf. Graham*, 950 F.2d at 1029 (*Penry* applies only to evidence "not of good character, but of bad character; not evidence of potential for rehabilitation, but of its absence"). Just as evidence of mental retardation and childhood abuse have mitigating value not completely encompassed by the former Texas special issues, so too does extensive mitigating evidence of *redeeming* personal qualities.

People do not worship God, work at jobs, and show affection and support for their families merely to prove to the world at large that they present no threat of violence in the future. We rightly attach a greater value to a person's lifelong endeavors – even if they span only seventeen years – than reducing them to ciphers in a calculus of "future dangerousness." It is because the focus of the second special issue is so relentlessly narrow that the Eighth Amendment is offended, in cases like Gary Graham's, where a jury must limit consideration of all redeeming qualities based solely on its scope.

All the mitigating value of Mr. Graham's life cannot be shoehorned into the narrow consideration of the possibility of his future dangerousness. The mitigating value of his seventeen years of peaceful and supportive living was lost to the facts surrounding a single week of unlawful activity. Because the trial judge so trivialized the jury's inquiry into future dangerousness – authorizing them to return an affirmative answer if they suspected Mr. Graham might "scratch the paint on a car," or "ride his motorcycle on the high school lawn" – the jury could not give weight to Mr. Graham's evidence of redeeming characteristics in answering the second special issue.

The third special issue afforded no adequate vehicle for giving effect to Mr. Graham's evidence of redeeming character traits and acts of kindness. As with the first special issue, these facts were simply irrelevant to a determination whether he acted "unreasonably" in response to any provocation by the deceased. Thus, this evidence could not affect the jury's

answer to the third special issue, and its mitigating value was lost.

Mr. Graham's extensive mitigating evidence of religious devotion, concern for his children, love for his family, and acts of kindness could not be given full independent mitigating weight by a jury restricted to the special issues. The significance of these facts about Mr. Graham's character and record to his moral culpability for the offense is not adequately captured in the jury's determination whether he acted "deliberately," whether there was a "probability" that he might be dangerous in the future, or whether he had acted "unreasonably" in response to any provocation. That is, the fact that Mr. Graham had regularly attended church, "loved the Lord" and worked hard to provide his children food and clothing were relevant to his character – to whether he should be put to death – in a more fundamental and basic sense than their relevance to these three narrow inquiries. A reasonable juror could have concluded that Mr. Graham acted deliberately, might be dangerous in the future, and acted "unreasonably" in response to any provocation – and *nevertheless* have concluded that, as dissenting Judge Higginbotham put it in the court below, "when Graham's tender years and family circumstances [were] entered in the account of moral culpability, a death sentence [was] not warranted." *Graham*, 950 F.2d at 1036 (Higginbotham, J., dissenting). It is this "reasoned moral response" which *Penry* mandates the jury be empowered by instructions to effect.

C. The Fifth Circuit's analysis disregards the difference, recognized in Penry v. Lynaugh, 492 U.S. 302 (1989), between moral culpability on the one hand and the focus of the special issue questions on the other.

The *en banc* Fifth Circuit majority disregarded the key distinction this Court drew in *Penry*: the difference between "personal moral culpability" and the factual findings evidenced by the answers to the special issue questions of the former Texas capital sentencing statute. *Penry* holds that

those answers may inform and influence the jury's "reasoned moral response," but they cannot determine it. In a given case, the two may converge; if a defendant's mitigating evidence has no relevance to his personal culpability beyond its expression in the answers to the special issue questions, then the Eighth Amendment permits a death sentence to be imposed on the basis of those answers alone. *See Franklin*, 487 U.S. at 185-186 (O'Connor, J., concurring). If, however – as in Mr. Graham's case – the mitigating evidence could reasonably support a life sentence notwithstanding "yes" answers to the special issues, the Eighth Amendment requires that the jury be given instructions to effect that conclusion.

The court of appeals, ignoring the plain teaching of *Lockett*, *Eddings*, and *Penry*, continues to view the answers to the special issues as the only important index of the defendant's moral culpability, and accordingly as determinative of sentence in all but the rarest cases. As the Fifth Circuit summarized its holding

> We conclude that *Penry* does not invalidate the Texas statutory scheme, and that *Jurek* continues to apply, in instances where no major mitigating thrust of the evidence is substantially beyond the scope of all the special issues.

Graham, 950 F.2d at 1027. This tortured analysis, which continues to exalt the answers to the special issues and begrudge a straightforward assessment of the defendant's moral culpability, turns *Penry* on its head. The *Graham* test as described above is complex enough; closer inspection reveals it as a Procrustean bed of limitations, qualifications, and reservations. The very intricacy of the Fifth Circuit's test reveals its incompatibility with *Lockett's* clear mandate; this section will address some of the ways the *Graham* formula departs from settled Eighth Amendment principles of capital sentencing.

First, the *Graham* formula compels a complex two-part inquiry: the reviewing court must initially determine the "major mitigating thrust" of a defendant's evidence. Then, it must measure the degree by which this "thrust" exceeds the scope of each special issue of the former Texas statute. Only

if the "thrust" is "substantially" beyond the scope of all of the special issues is resentencing required. *Graham*, 950 F.2d at 1027. This elaborate system finds no support in this Court's Eighth Amendment cases.[35]

Graham nowhere suggests how to distinguish the "major mitigating thrust" of a defendant's mitigating evidence from some lesser "thrust," or why the distinction, even if the majority could articulate it, has constitutional significance. The very idea of "thrusts" as an Eighth Amendment concept is at odds with the objective which this Court has traditionally understood capital sentencing juries to pursue. The ultimate goal of the Eighth Amendment requirement of the consideration of mitigating evidence is to permit the jury to determine whether the evidence taken as a whole points to life imprisonment, rather than death, as the appropriate sentence. In such an inquiry, it is the "whole ball of wax," rather than a single feature of a defendant's character or background, that may move a reasonable juror to decline to impose death.[36] This Court has recognized this practical reality in its own descriptions of the jury's role at sentencing: "[i]n a capital sentencing proceeding before a jury, the jury is called upon to make a 'highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves.' " *Turner v. Murray*, 476 U.S. 28, 33-34 (1986) (quoting *Caldwell v. Mississippi*, 472 U.S. 320 (1985)). Judge Higginbotham highlighted the same key principle in his dissenting opinion below:

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[35] Ironically, Penry himself could not have prevailed under *Graham*. *Graham* demands that the defendant's "mitigating thrust" substantially exceed *all* of the special issues before resentencing is required. Penry's mental retardation and childhood abuse plainly had significant mitigating relevance to the "deliberateness" issue. Thus, under *Graham*, Penry would not have been entitled to an additional vehicle for the jury's consideration of this evidence.

[36] *See, e.g., Hitchcock v. Dugger*, 481 U.S. 393, 398 (1987) (describing defense counsel's argument urging jury to "look at the overall picture . . . consider everything together . . . consider the whole picture, the whole ball of wax" in determining the appropriate sentence).

> There is a point at which we must accept that the moral culpability of a particular person for a particular crime is what the jury says that it is. With all deference [to the majority], this quintessential blackbox decision yields to no logical or explainable divisor.

Graham, 950 F.2d at 1036 (Higginbotham, J., dissenting). The Fifth Circuit's "major mitigating thrust" formula attempts to craft precisely such a "logical divisor," and fails. This Court has made clear that it is instead a thoroughgoing "reasoned moral response" – an informed decision whether, when the defendant's aggregate background and character are considered, death is warranted – toward which the Eighth Amendment "thrusts" at punishment. Five other dissenters below likewise criticized the majority's hypertechnical calculus:

> Youth, like mental retardation or crippling circumstances in the defendant's background, may be related to deliberateness or to future dangerousness, but those facts of a defendant's life may also affect an entirely different "thrust" and decision. They may reach the much broader ultimate question: Is death the appropriate response to this human being, considering his moral culpability as a person? Graham's jury was not told that it could consider evidence in this light or that it could give mitigating effect to it in imposing sentence.

Graham, 950 F.2d at 1035 (Reavley, J., joined by Politz, King, Davis, and Wiener, JJ., dissenting).

The *en banc* majority's "major mitigating thrust" test is at war with this Court's repeated description of a capital sentencing jury's decision as a "reasoned moral response," sensitive to *all* the unique facts and circumstances of the particular case. *See, e.g., Penry*, 492 U.S. at 323. This Court's cases make plain that such a "response" is informed by "the experience of mankind, as well as the long history of our law," in divining those diverse human qualities which tradition, precedent, and logic identify as relevant to moral culpability. *Goss v. Lopez*, 419 U.S. 565, 590 (1975) (Powell, J., dissenting). Accordingly, the Eighth Amendment "does not

weigh the 'thrust' of the mitigating evidence as between [the] special issues and the decision to sentence to death." *Graham*, 950 F.2d at 1035 (dissenting opinion).

In another qualification of this Court's established Eighth Amendment rules, the *Graham* majority restricted *Penry's* application to cases in which the defendant's mitigating circumstances were permanent. *See Graham*, 950 F.2d at 1031; *see also id.* at 1034 (dissenting opinion) ("[the majority] holds that no instruction or jury decision is needed for transitory circumstances of mitigation").[37] This proposition – that any mitigating circumstance which time might ameliorate can be given adequate consideration in answering whether the defendant may be dangerous in the future – is as insupportable under the Eighth Amendment as the "major mitigating thrust" test.

This "permanence" requirement reflects the Fifth Circuit's failure to appreciate that the relevance of mitigating evidence to one of the special issues does not necessarily exhaust its relevance to an appropriate sentence.[38]

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[37] This holding subsequently has been invoked to deny *Penry* relief where defendants presented evidence of alcoholism and acute intoxication. *See Barnard v. Collins*, 958 F.2d 634, 639 (5th Cir. 1992) ("Barnard's evidently frequent episodes of heavy alcohol consumption, alcohol intoxication, and marijuana use does not demonstrate that the episodes were attributable to a permanent handicap"); *see also Cordova v. Collins*, 953 F.2d 167, 169-170 (5th Cir. 1992) (evidence that defendant was "drinking heavily" at the time of the offense, drank frequently, and "act[ed] crazy" when drunk, "not the kind of uniquely severe permanent handicap" requiring additional jury instructions under *Penry*) *cert. denied*, ___ U.S. ___, 112 S. Ct. 959 (1992).

[38] The court below also erred in its insistence that Mr. Graham's youth must somehow explain or excuse the capital offense in order to be constitutionally mitigating. *Graham*, 950 F.2d at 1031 ("[y]outh is not mitigating with respect to conduct not attributable to it"). This argument ignores this Court's consistent instruction to the contrary. *See, e.g., Payne v. Tennessee*, ___ U.S. ___, 111 S. Ct. 2597, 2602-2603 (1991) (mitigating evidence "*must* be received" and considered, even if it is not related to the circumstances of the crime (emphasis in original); noting that evidence that

Undeniably, youth is relevant to the jury's decision whether the defendant may pose a future threat to society. But all those who are found to present such a risk may not be "blindly subjected to the penalty of death." *Woodson*, 428 U.S. at 304. The sentencer must be allowed to consider whether a particular "dangerous" individual nevertheless deserves a sentence other than death, based on factors our society has long regarded as justifying leniency. According to *Lockett*, *Eddings*, and *Penry*, the jury must have an opportunity to give affirmative mitigating weight to youth – not merely to consider it as "negating" the possibility of future dangerousness.[39]

This conclusion is compelled not only by *Penry* but by *Eddings* as well. Under the Oklahoma scheme at issue in that case, the trial court was required to determine whether Eddings posed a "continuing threat to society."[40] In reversing Eddings' death sentence, this Court never suggested that the fact that his youth would have mitigated against such a finding exhausted its relevance to his appropriate sentence. *Eddings*, 455 U.S. at 107, 108 n.3. *Eddings* establishes that both the chronological age of a minor and the attendant transitory infirmities of youth are constitutionally mitigating, and the sentencer must be empowered to give them

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defendant was "a good son," "extremely polite," and "suffered from a low IQ" was all constitutionally mitigating, despite not being causally related to the offense).

[39] *See Lockett*, 438 U.S. at 608 (instructions must permit sentencer to consider the defendant's "age . . . as such" in determining appropriate sentence).

[40] The language of Oklahoma's "future dangerousness" aggravating factor precisely tracked that of the second special issue of the Texas statute: whether there was "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Eddings*, 455 U.S. at 107, citing Okla. Stat., Tit. 21, § 701.12 (7) (1980).

independent weight in imposing sentence. *Eddings*, 455 U.S. at 115-116.[41]

Graham also requires a reviewing court to substitute its judgment concerning the mitigating weight of the specific facts and circumstances of each case for that of the jury. The result is not the sensitive "reasoned moral response" of a jury familiar with the defendant's mitigating evidence as presented at trial, but a clumsy approximation that risks producing profoundly inaccurate results. This Court's cases do not support such a practice. Once a factor is established as relevant to the sentencer's ultimate decision concerning the defendant's moral culpability, this Court has said that the weight of particular evidence in particular cases is for the sentencer – here, for the jury.[42]

Another part of the *Graham* test similarly attempts to minimize the importance of mitigating evidence in comparison to the jury's answers to the special issue questions. The court of appeals unfairly discounts the value of particular mitigating evidence by imposing a requirement of "elaboration" that finds no mooring in the Eighth Amendment. The

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[41] Virginia's capital sentencing statute likewise usefully illustrates the wrongheadedness of the Fifth Circuit's approach. The Virginia statute makes future dangerousness one of two aggravating factors, one of which must be established before death may be imposed. *See* Va. Code Ann. § 19.2-264.4C (Michie (1992)). Under the Fifth Circuit's reasoning, a defendant's youth could properly mitigate against a finding of this factor. However, the Virginia statute also includes a non-exclusive list of *mitigating* factors, including "the age of the defendant at the time of the commission of the capital offense," and the jury is instructed that it may base a life sentence on a finding of such a mitigating circumstance. Va. Code Ann. § 19.2-264.4B(v). The Virginia scheme therefore affords what the former Texas statute did not: a vehicle for considering particular evidence as independently mitigating, notwithstanding its relevance to the "future dangerousness" inquiry.

[42] *See, e.g., Eddings*, 455 U.S. at 114-115 ("The sentencer [in a capital case] may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration").

court of appeals' discussion of Mr. Graham's troubled family background reveals the inherent and impermissible subjectivity of such an analysis. The Fifth Circuit conceded that the testimony at sentencing established

> that Graham's mother was frequently hospitalized, commencing when he was approximately three [years old], with what [was] characterized without elaboration as a "nervous condition" or "mental illness."

Graham, 950 F.2d at 1033. The court acknowledged that "evidence of this general kind might well form part of a proper *Penry* presentation." *Id.* Although it recognized that this evidence bore on Mr. Graham's moral culpability, the court held that it presented no *Penry* error because "[t]here was no evidence of *any* effect this had on Graham, or of any reaction on his part to it, and no attempt was made to even explore that subject." *Id.*[43] (emphasis in original). The court concluded that there was no "substantial evidence" that Graham's turbulent family background had left him impaired, and that "the evidence as a whole is simply not comparable to that in *Penry* or *Eddings*." *Id.*

This analysis trivializes factors already recognized by this Court as vital to an informed sentencing decision. Surely it is not necessary to "spell out" the fact that a childhood spent being shuttled from one relative to the next, deprived of a mother's nurturing and guidance by her hospitalization in an asylum, could have a destructive "effect" on a child. Similarly, a reasonable juror could certainly infer that the actions

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[43] In subsequent cases, the Fifth Circuit has expanded this part of the *Graham* test to require that the defendant must have presented expert testimony in support of obvious inferences from traditional mitigating evidence before he is entitled to relief under *Penry*. *See, e.g., Barnard v. Collins*, 958 F.2d at 638 (defendant, who introduced testimony that he had suffered serious head injuries from a beating with a tire iron, "did not introduce expert testimony relating to his psychological disorders," and "his mother's inexpert speculation concerning [his] mental condition" [she recounted that Barnard had sought psychiatric help and had been unpredictably moody] cannot establish a "*Penry*-type disability."

of a seventeen-year-old with such a background might reflect the emotional and psychological deficit he suffered as a result. These common sense observations demonstrate why the "elaboration" apparently required by *Graham* cannot be squared with the Eighth Amendment.

Graham dilutes *Penry's* strong guarantee of "full mitigating effect" into a weak promise to protect the "major mitigating thrust" of the defendant's evidence. In addition, the court of appeals fashioned numerous ancillary barriers to the full consideration of mitigating evidence. *Graham's* reluctance to permit the jury an informed "grant of mercy . . . based on [the defendant's] mitigating evidence" betrays a fundamental misunderstanding of *Penry* and the Eighth Amendment mandate it reflects. *Penry*, 492 U.S. at 326-327.

CONCLUSION

Mr. Graham's jury heard evidence which could well have convinced a reasonable juror that a sentence less than death was appropriate. Nevertheless, the former Texas capital sentencing statute confined the jury's deliberations such that the jurors could not express their "reasoned moral response" in answering the special issue questions. This preclusive effect violated Mr. Graham's Eighth Amendment right to an individualized determination of sentence. Petitioner Gary Graham thus respectfully prays that this Court reverse the judgment of

the United States Court of Appeals for the Fifth Circuit in his case and remand with directions to grant the writ of *habeas corpus*.

Respectfully submitted,

ROBERT C. OWEN
Texas Resource Center
1206 San Antonio St.
Austin, Texas 78701
512/320-8300

JEFFREY J. POKORAK
St. Mary's University
School of Law
1 Camino Santa Maria
San Antonio, Texas
78228-8603
512/436-3779

* MICHAEL E. TIGAR
University of Texas
School of Law
727 East 26th St.
Austin, Texas 78705
512/471-6319

*Counsel of Record